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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

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No.

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WILLIAM A. STERNKOPF, JR.,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, William A. Sternkopf, Jr., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*) is not yet reported.

## JURISDICTION

The judgment of the United States Court of Appeals affirming the judgment of conviction of Petitioner was entered on May 22, 1972. A timely application for an extension of time in which to file this petition was granted by Mr. Justice Brennan on June 5, 1972. The time to file was extended to and including July 21, 1972.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are Title 18 U.S.C., Sections 371, 1951, and 1952. The constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States. They are reproduced in Appendix B, *infra.*

## QUESTIONS PRESENTED

Whether Petitioner was deprived of his constitutional right to be tried only upon the indictment of a Grand Jury where

(a) the prosecution was allowed to prove and the [redacted] Jury was permitted to convict on the basis of transactions clearly beyond the scope of the conspiracy charged in Count I of the indictment—the only conspiracy considered by the Grand Jury—in violation of the principles enunciated in *Stirone* v. *United States*, 361 U.S. 212 (1960), and

(b) Count II of the indictment was so broad and lacking in specificity that it failed validly to charge any crime, but rather permitted the prosecution and both courts below to usurp the function of the Grand Jury and to so vacillate in defining the limits of the conspiracy that Petitioner was never certain of the specific crime with which he was charged—all in violation of the principles enunciated in *Russell* v. *United States*, 369 U.S. 749 (1962).

## STATEMENT OF THE CASE

### A. The Indictment

On November 16, 1970, the Federal Grand Jury for the District of New Jersey returned a thirty-four count indictment naming Petitioner Sternkopf and eleven co-defendants in every count.

Count I charged that the defendants and other co-conspirators, from at least as early as November 1, 1963, and continuing to the date of the indictment, conspired in violation of the Hobbs Act (18 U.S.C. § 1951) to:

> "affect interstate commerce . . . by *extortion* . . .; that is to say, that the defendants did conspire to delay, to obstruct, to impede and to thwart *construction* undertaken on behalf of *the City of Jersey City and the County of Hudson*, the contractors and the engineers performing such work, and the timely and usual movement of supplies and materials needed to complete such projects, in order to obtain the property of contractors, engineers and others working for and on said *public construction projects* pursuant to said contracts, . . . having been induced both by the wrongful use of fear and under color of official right. . . ." (Emphasis supplied.)

Count II charged, in language which we shall show was unconstitutionally vague, that during the same period the defendants and other co-conspirators, in violation of the general conspiracy statute (18 U.S.C. § 371), conspired with each other to violate the Travel Act (18 U.S.C. § 1952), that is, that they conspired:

> "to commit certain offenses against the United States in violation of [18 U.S.C. § 1952] in that the defendants . . . would use and wilfully cause others to use the facilities in interstate commerce . . . with the intent to . . . carry on . . . the crimes of *bribery and extortion in violation of the laws of the State of New Jersey*. . . ." (Emphasis supplied.)

Count II also alleged that it was a part of the conspiracy to hide and conceal the purposes and acts of the conspiracy. It further alleged five overt acts, four of which involved instances of interstate travel to purchase bonds, while the fifth involved telephone calls and interstate travel by a member of a Baltimore construction firm.

The remaining counts of the indictment, III through XXXIV, all alleged specific substantive offenses in violation of the Hobbs Act and in furtherance of the conspiracy charged in Count I. The indictment charged no substantive offenses of bribery or extortion in furtherance of the conspiracy charged in Count II.

### B. The Evidence

At the time the Grand Jury returned its indictment, the government possessed evidence that the defendants had conspired, under the leadership of J. V. Kenny (formerly Mayor of Jersey City and throughout the relevant period "political leader" of Hudson County), to extort money from construction contractors seeking to do business with Jersey City and Hudson County, as charged in Count I. It was not until *after* the indictment was returned,[1] however, that the government discovered most of the evidence which it relied upon to convict Sternkopf. This newly discovered evidence was not additional proof of the City-County construction conspiracy charged in Count I; it was evidence of other crimes and conspiracies at complete variance with that Count.

At the trial, the government's witnesses testified that, pursuant to the conspiracy charged in Count I, construction contractors were forced to pay kickbacks to selected City and County officials to obtain contracts with the City or County. This testimony, though vigorously denied by Sternkopf and by witnesses who testified on his

[1] Trial Transcript, hereinafter referred to merely by page number, pp. 1681, 1843, 2051-53, 4828.

behalf, would have nevertheless permitted the jury to find that Sternkopf participated in (though he was never shown to have received a single dollar from) this City-County construction conspiracy.

The government also introduced *as direct proof of the undefined conspiracy charged in Count II* (247, 255, 1029, 4[illegible]9-31) evidence of other crimes and conspiracies, much more damaging to Sternkopf. Sternkopf was thus implicated in two independent schemes by which a firm allegedly bribed him and other defendants to obtain a contract for bridge construction outside Hudson County from the New Jersey Turnpike Authority, a state agency of which Sternkopf was a Commissioner; and to settle a claim against the Port of New York Authority, an interstate agency of which Sternkopf was also a Commissioner, for work done on the runway at LaGuardia Airport. Sternkopf was also portrayed as a "concealer" by testimony that he helped invest funds which one of his co-defendants, J. J. Kenny (no relation to J. V. Kenny), had received as bribes for protecting an illegal gambling operation run by Lefty Marchitto in Jersey City. None of these transactions had anything to do with the City-County construction conspiracy described in Count I.

### C. Disposition in the Trial Court

At the close of the government's case, five of the thirty-two substantive counts supporting Count I were dismissed (4781-86). The jury found seven of the defendants, including Sternkopf, guilty of all 29 remaining counts, and found defendant Kunz guilty of 17 of those counts. The other four original defendants had been severed.[2] After sentences were imposed (Sternkopf re-

[2] Prior to trial, J. J. Kenny and Frank G. Manning, respectively, were severed on motion of the United States Attorney because they were to be the two principal immunized witnesses for the government. Following the government's opening statement, defendant Corrado was also severed and pleaded guilty to Count II. On June 10, after the trial had begun, J. V. Kenny was severed for reasons of health.

ceiving ten years in prison and a $20,000 fine), seven of the convicted defendants appealed, and two of them subsequently withdrew their appeals.

### D. Decision of the Third Circuit

The Court of Appeals for the Third Circuit unanimously affirmed the convictions of the five remaining defendants. Although its Slip Opinion is 40 pages long, the vitally important issues here raised, which were extensively briefed in the Court of Appeals, were ambiguously treated or summarily dismissed by that court. The Third Circuit held that Count II was pleaded with sufficient specificity to satisfy constitutional standards; and that the indictment somehow charged a "single overall conspiracy," the scope of which it never clearly defined. The court apparently held (largely *sub silentio*) that all the evidence against Sternkopf, including evidence having no connection whatever with the City-County construction conspiracy, was properly admissible.

## REASONS FOR GRANTING THE WRIT

Absent Count II of the indictment, which contained no reasonable limits in its description of the conspiracy it so vaguely charged, it would have been perfectly obvious to the trial court and the Court of Appeals that most of the government's evidence aimed at Sternkopf was beyond the scope of the indictment. The trial court would have had no alternative but to exclude such evidence, and had it failed to do so, the Court of Appeals would have been compelled to reverse Sternkopf's conviction on the basis of this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212, 217 (1960), which reaffirmed the long standing rule "that a court cannot permit a defendant to be tried on charges that are not made

in the indictment against him,"[3] and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), which held that it was reversible error to permit proof of multiple conspiracies pursuant to an indictment charging a single conspiracy.

Yet, Count II did exist and, as we shall show, the prosecutor took advantage of its vague terms to redefine the scope of the conspiracy at every stage of the proceedings, without fear of contradiction by the indictment itself, and with the approval of the trial court and the Court of Appeals. If a vague count can be so used, the very foundation of the protection afforded by the Fifth and Sixth Amendments, so clearly described in *Russell* v. *United States*, 369 U.S. 749 (1962), has been rendered meaningless.[4] In *Russell*, condemning the very practices with which Sternkopf was faced throughout his trial and appeal, this Court pointed out that a "cryptic form of indictment . . . requires the defendant to go to trial with the . . . issue undefined"; and that "[i]t enables his conviction to rest on one point and the affirmance of the conviction to rest on another." (369 U.S. at 766.)

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[3] While in *Stirone* reversal was required because of a variance in the *type of commerce affected*, as opposed to the *act of extortion charged*, in the present case the variance related to the extortion charged. However, contrary to the implication in the opinion below, *Stirone* held that both are "essential elements" of the crime and that "neither should be treated as surplusage." *Stirone*, *supra*, at 218.

[4] The petitioners in the *Russell* case, who had been summoned to testify before a Congressional committee, were indicted for refusal to answer "any question pertinent to the question under inquiry" in violation of 2 U.S.C. § 192. The convictions were reversed because the indictments failed to identify the subject under committee inquiry when petitioners were interrogated. Admittedly, the factual setting of *Russell* is quite different from that in the present case. However, the comprehensive analysis of the dangers resulting from overly broad indictments, which formed the basis for this Court's decision in *Russell*, is equally applicable here.

This Court must therefore grant certiorari unless it is willing to let stand a conviction resting on a flagrant disregard of *Stirone* and *Kotteakos*, camouflaged and justified by the existence of an unconstitutionally vague conspiracy count which led to the very dangers foreseen and condemned by *Russell*.

### I. Count II Was Unconstitutionally Vague on its Face

Count I of the indictment, charging a conspiracy to collect kickbacks from construction contractors doing business with the City and County, is, as the court below noted (10a, *infra*),[5] identical in all material respects with the conspiracy count in *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972). But the indictment in *Addonizio* contained no counterpart to the vague Count II which was the genesis of the error here complained of.

Count II here charged the defendants and other co-conspirators with conspiring—

> "to commit certain offenses against the United States in violation of [18 U.S.C. § 1952] in that the defendants . . . would use and wilfully cause others to use the facilities in interstate commerce . . . with the intent to . . . carry on . . . the crimes of bribery and extortion in violation of the laws of the State of New Jersey . . . [and] would perform other acts for the purpose of . . . concealing . . . the purposes of, and acts in furtherance of the conspiracy. . . ."

The charging language of Count II did not plead any facts at all; it merely stated legal conclusions. There was no allegation of the particular acts of bribery or

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[5] Citations to the appendices attached hereto are hereinafter designated "a".

extortion the defendants conspired to commit; no averment of specific dates nor of the parties from whom defendants conspired to take bribes and extort funds; no mention of the surrounding circumstances or the place of the conspiracy; no identification of the object of the conspiracy beyond saying that it was to bribe and extort in violation of New Jersey law.[6] It is difficult to imagine a count more vague and indefinite or one which so totally fails to provide assurance that the Grand Jury considered any specific factual basis for the essential elements of the criminal offense charged.

Indeed, as we shall show, Count II left the prosecutor free—and he made full use of such freedom—to fill in the blanks, to roam at will, to arrogate to himself the functions of the Grand Jury and to introduce any evidence he could discover relating to *any* conspiracy to bribe or extort *any* person in violation of New Jersey law during the seven-year period covered by the indictment. Consequently, that count clearly violated the requirement of the Fifth Amendment that "[n]o person shall be held to answer for a capital, or otherwise infamous, crime unless on presentment or indictment of a Grand Jury. . . ." and the requirement of the Sixth Amendment that an accused be informed of the "nature and cause of the accusation" against him.

The court below, in upholding Count II against the charge of vagueness, concluded that the count was suf-

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[6] The allegation of overt acts in Count II in no way clarified the *object* of the conspiracy, which this Court has held to be an essential element of a conspiracy charge. *United States* v. *Falcone*, 311 U.S. 205, 210 (1940). The overt acts here alleged did not even supply by inference a general description of the specific extortion or bribery the defendants were said to have conspired to commit. See *United States* v. *Devine's Milk Laboratories, Inc.*, 179 F. Supp. 799, 801 (D. Mass. 1960), approved by this Court in *Russell* v. *United States*, *supra*, at 765-66.

ficient because "[i]t charges the statutory crime in the language of the statute." (12a, *infra.*) Yet, *Russell* makes it clear that "[a]n indictment not framed to apprise the defendant 'with reasonable certainty of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.'" (369 U.S. at 765.) In this respect, *Russell* was merely reiterating the long-established position of this Court that "it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; . . . it must state the specifies—it must descend to particulars." (*United States* v. *Cruikshank*, 92 U.S. 542, 558 (1876).)[7]

The court below apparently thought that the complete lack of specificity in Count II was sanctioned by *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927), and *Hagner* v. *United States*, 285 U.S. 427, 431 (1932). Although this Court acknowledged in *Wong Tai* that a conspiracy indictment need not state the object of the conspiracy with the same precision that would be required in an indictment for committing the substantive offense, it is nevertheless clear that the offense which the defendants conspired to commit must be identified with

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[7] True to this teaching, the court in *United States* v. *Apex Distributing Co.*, 148 F. Supp. 365 (D. R.I. 1957), in striking down for vagueness an indictment charging a conspiracy to commit "the crime of bribery in violation of Title 18, United States Code, Section 201," stated in language which could well have been written for the present case:

> "No details or particulars . . . are given. . . . [The object] . . . is stated to be: 'The crime of bribery in violation of Title 18, United States Code, Section 201.' There is no identification of the person whom the defendants planned to bribe, no statement of his connection with the United States government, no description of the bribe which was promised, offered or given or of the purpose for which it was promised or offered or given." (148 F. Supp. at 370.)

some specificity.[8] Moreover, *Wong Tai* and *Hagner* are totally inapposite because the indictments in those cases do not begin to approach the total lack of specificity found here in Count II.[9]

### II. The Vagueness of Count II Obscured the Manifest *Stirone* and *Kotteakos* Errors and Resulted in the Very Kind of Prejudice Foreseen in *Russell*

One need only look at what actually happened in this case—at the intolerable confusion generated by Count II—in order to see clearly the necessity for the constitutional requirement that an indictment must be reasonably specific. There was introduced against Sternkopf damaging evidence which was beyond the scope of the indictment intended by the Grand Jury; but the courts below were blinded to this fact by the vagueness of Count II and by the constantly shifting versions of its meaning.

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[8] In *Apex Distributing Co., supra*, cited by this Court in *Russell* (369 U.S. at 765-66) as illustrative of recent federal decisions upholding "basic principles of fundamental fairness," the trial court stated:

> "While it is true that where the object of a conspiracy is to commit a crime, the crime to be committed need not be described with the same degree of particularity that might be required in an indictment charging its commission as a substantive offense, this does not mean that no particulars whatever as to such crime need be given. And this is especially true where the statute employs broad and comprehensive language descriptive of the general nature of the offenses denounced." (148 F. Supp. at 370.)

[9] In *Wong Tai*, the object of the conspiracy—illegal transportation and sale of opium—was set forth in great detail, including the number of sacks of opium involved, the ships upon which they were imported, and the date on which each shipment arrived. This Court found the conspiracy charge to be sufficiently definite and certain. (273 U.S. at 79-80.) In *Hagner*, the only claimed defect was that the indictment, which charged the mailing of a letter, failed to state that the letter was delivered. (285 U.S. at 431.)

### A. *The Vacillation of the Government at Trial and the Position of the Trial Court*

Initially, having evidence only of the City-County construction conspiracy charged in Count I,[10] the prosecutor took the position that Count II charged the *same conspiracy* as Count I and that it differed from Count I only in that it added a new jurisdictional element—"use of" interstate commerce (as required by the Travel Act) in lieu of "effect on" interstate commerce (as required by the Hobbs Act). Thus, in its Brief in Opposition to Motions for Severance, the government stated:

> "Moreover, the elements of proof that differ (effect on interstate commerce in Count I and Counts III through XXXIV and use of interstate facilities in Count II) cannot rationally be deemed to be prejudicial to any of the defendants because such proof goes not to an issue of culpability but *simply to the issue of jurisdiction.*" (Joint Appendix filed in Court of Appeals, p. JA 696) (Emphasis supplied.)

But by the time the trial began, the government had been advised by one of the immunized defendants of evidence of various crimes and conspiracies—including the Turnpike and Port Authority transactions and the concealment of gambling bribes referred to above—which were clearly outside the scope of the City-County construction conspiracy and which, but for Count II, undoubtedly would have been viewed as at complete variance with the indictment. But the prosecutor had Count II available and he was determined to use it. By the time the trial began, he no longer viewed that Count as a mere jurisdictional restatement of Count I. In order to permit the introduction of the government's newly discovered evidence, he construed Count II to cover *any*

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[10] Significantly, as stated above, every one of the 32 substantive counts in the indictment describes an instance of extortion in furtherance of the City-County construction conspiracy charged in Count I.

extortion or *any* bribery of *any* person in violation of New Jersey law.

Thus, for example, referring to the Turnpike contract and the Port Authority claim, the United States Attorney, in his opening statement to the jury (255), stated:

> "*We will prove pursuant to Count 2 of the indictment before you* that the firm of J. Rich Steers paid $45,000 . . . to obtain work from the New Jersey Turnpike at the time when the defendant Sternkopf was Vice-Chairman of the New Jersey Turnpike . . . [and] that the same firm . . . paid . . . $30,000 at a time when the defendant Sternkopf was the Commissioner of the Port of New York Authority in return for receiving a settlement from the Port of New York Authority of almost $1,000,000." (Emphasis supplied.)

Immediately after the government's opening statement (273-74), Sternkopf moved to dismiss (or alternatively to sever Count II) on the ground that the Turnpike and Port Authority evidence would be at "complete variance" with the indictment. If it had heeded the government's pre-trial representation that Count II was merely a jurisdictional restatement of Count I, the trial court at that point, in compliance with *Stirone*, would have instructed the prosecutor to confine his evidence against Sternkopf to matters charged in the indictment. Instead, obviously relying upon the breadth of Count II, the court ruled that these transactions were—

> "*proof* that . . . [Sternkopf] was one of the co-conspirators and *that he participated in the commission of the offenses alleged* by the United States." (275.) (Emphasis supplied.)[11]

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[11] Later, counsel for Sternkopf also objected to the entire line of testimony relating to the Turnpike and Port Authority transactions as "being irrelevant with respect to the indictment" (1049, 1058), but was summarily overruled (1049, 1058).

Later, in response to Sternkopf's motion for a judgment of acquittal (4818) on the ground that the testimony with regard to the Turnpike and Port Authority had "nothing to do with the charges in this indictment . . . and had nothing to do with City and County officials" (4823-24), the trial court clearly revealed the extent to which the two conspiracy counts had, in his mind, become interwoven. The court denied Sternkopf's motion, explaining that—

> "[t]he charges of the first two counts are general, charging extortion by public officials . . . [and that] Mr. Sternkopf was a public official . . . [and] a member of the so-called official family of Hudson County." (4824)

Not only did the judge admit the evidence complained of, but, by confusing the first two Counts, he affirmatively invited the jury to consider such evidence as proof of the City-County construction conspiracy, with which it had no connection. Thus, the judge defined an essential element of *Count I* by quoting from the broad language of *Count II* which referred to a conspiracy "to *commit . . . offenses against the United States.*" (6776-77.)

And so it is clear that the specifically defined conspiracy to extort from contractors doing public construction for Jersey City and Hudson County (Count I) and a separate jurisdictional basis for that conspiracy (Count II) had become, in the eyes of the trial court, a virtually limitless charge of conspiratorial wrongdoing. On this premise, the government was permitted to introduce its newly discovered evidence of conspiracies which were unrelated to each other or to the Count I City-County construction conspiracy, and the jury was permitted to consider such evidence, without any limitation, in determining whether to convict Sternkopf under the indictment.

### B. *Position of the Government on Appeal*

Fearing that Count II, as it had been construed and used during the trial, was so hopelessly vague that it would not withstand constitutional scrutiny — a fear which, for the reasons set forth under I, *supra*, was entirely justified—the government on appeal again shifted direction 180 degrees, reverting to the position it had taken prior to trial but which it soon saw fit to abandon, namely, that Count II actually charged only the same conspiracy as Count I. In its brief to the Third Circuit, the government stated:

> "Count I described an agreement, entered into by influential County and City officials, whereby, acting under one command, assisting each other where appropriate, every contractor, supplier and engineer seeking to do work on behalf of the City or County would be required to pay tribute. Count II does not describe a different agreement. *The only distinction between the counts is one of jurisdiction.*" (Government Brief on Appeal, hereinafter "Gvt. Br.", 69-70) (Emphasis original.)

This shift of position forced the government to claim in the Court of Appeals that evidence which it had introduced as direct proof of the unconstitutionally vague conspiracy described in Count II was, in fact, admissible for other more limited purposes. Thus, the Turnpike and Port Authority evidence was claimed to be admissible as "background" (Gvt. Br. 35) to show a "prior course of dealings (Gvt. Br. 33, 97) or the "state of mind of the victim" (Gvt. Br. 98); to "corroborat[e] the testimony of J. J. Kenny" (Gvt. Br. 179); to show "Sternkopf's guilty knowledge and criminal intent" (Gvt. Br. 98, 179); and to show generally "the system's machinery" (Gvt. Br. 179).[12]

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[12] In the case of the evidence that had portrayed Sternkopf as a "concealer" by indicating that he had assisted in the investment of funds received by J. J. Kenny from the gambler Lefty

These newly asserted grounds were obviously afterthoughts. The prosecutor knew very well how to justify the admission of evidence for limited purposes. Indeed, he had attempted to introduce for such purposes testimony—which he conceded to be beyond the scope of the indictment—that Jersey City employees were required to make "campaign contributions" of 3 per cent of their salaries to the J. V. Kenny organization.[13] The court refused to admit the evidence.[14] It might well have

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Marchitto as payoffs for protection of Marchitto's gambling operation, the prosecutor adjusted in a different way to the loss of Count II as the basis for the introduction of such evidence. In the Court of Appeals, he simply disregarded the uncontradicted testimony of his own witness that the funds involved came from gambling payoffs (*see, e.g.*, 1015-17; 1030-33; 1073-79; 1330-31; 1684-88; 1701-04; 1766-67; 1829; 1847-48) and argued, without any support whatever in the record, that such funds represented kickbacks received from City-County construction contractors and therefore tied Sternkopf to the conspiracy charged in Count I.

[13] In view of the fact that the prosecutor used Count II to justify other evidence outside the scope of the City-County construction conspiracy, one wonders why he conceded that extortion of employees, which was clearly within the literal language of Count II, was not covered by that count. Presumably, he instinctively realized that Count II could not constitutionally be construed to cover everything that its language embraced. In any event, this aberration illustrates graphically how the meaning of an excessively broad indictment is left to the whims of its interpreters.

[14] The following exchange occurred between the U. S. Attorney, Mr. Stern, and the court:

> "MR. STERN: . . . the question of the 3 percent, while it is true that it is not charged in the indictment . . . can be demonstrated in any number of doctrines. No. 1, to show the structure and nature of the conspiracy, who participated in it. No. 2, to show the intent, scheme and plan, motive, lack of restraint. I think there would be ample precedent for that.
>
> "THE COURT: I disagree with you. The defendants are not charged with extorting money from employees or with any conspiracy to extort money from employees.
>
> "MR. STERN: Certainly, but the doctrine I am invoking which is a doctrine that permits the prosecution to prove crimes not charged in the indictment as it bears on motive, intent. . . ." (3922-23.)

refused to admit the Port Authority and Turnpike evidence but for the claim that such evidence fell within Count II. If it had admitted that evidence as "background," the trial court would, of course, have been required to warn the jury of the limited purpose for which it could be considered. *United States* v. *McClain*, —— U.S. App. D.C. ——, 440 F.2d 241, 245-46 (1971).

When one follows the trail of government vacillation, it becomes clear that Sternkopf was subjected to the very practices condemned by this Court in *Russell*, *supra*, when it stated at 768:

> "At every stage in the . . . criminal proceeding . . . [he] was met with a different theory, or by no theory at all, as to what [crime was charged]. . . . Far from informing [him] of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal."

### C. *The Position of the Court of Appeals*

The Court of Appeals showed no appreciation whatever of the fatal flaw in the indictment or of the vacillation as to its meaning which had poisoned the entire trial. That court sustained the conviction without giving any definitive interpretation to the indictment and without giving any recognition of Sternkopf's plight in attempting to meet the shifting interpretations of the charge against him.

The Third Circuit should have construed the indictment narrowly as charging only the City-County construction conspiracy described in Count I (with a separate jurisdictional basis in Count II), since the government had represented prior to trial (p. 12, *supra*) and in its brief on appeal (p. 15, *supra*) that this was what was intended. Indeed, in view of the government's rep-

resentations, considerations of fairness and candor alone would seem to have required such a construction. But if the court had adopted this interpretation, it would clearly have been compelled to reverse Sternkopf's conviction under *Stirone* because of the introduction of highly damaging evidence outside the scope of the indictment as proof of his guilt.

On the other hand, the court could have ignored the government's representations, and, consistently with the government's conduct at trial and the rulings and instructions of the trial court, could have construed the indictment broadly as charging a conspiracy which embraced the evidence against Sternkopf which was outside the scope of Count I. In this event, the court would have been forced to rely upon the vague language of Count II as supporting such an interpretation, and would have been confronted with the obvious problem that Count II, in violation of the principles laid down by this Court in *Russell*, had no limits except those the court itself might choose to impose.

In a futile effort to avoid the dilemma with which it was faced, the Court of Appeals vacillated between the narrow and the broad constructions, apparently hoping that by failing clearly to commit itself, it could somehow steer between the Scylla of *Stirone* and the Charybdis of *Russell*.

Thus, at places in the opinion the court seems to define the conspiracy as one to extort from persons performing contracts for the City and County, as charged in Count I. For example, the court stated that the government's theory of the case, which was found amply supported by the evidence, was that—

> ". . . each [defendant] acting in concert with one or more of the others used his position to fasten upon both the *city* and *county* administrations a system whereby no one could do business with either

without kicking back a percentage, usually 10%, of the *contract* price." (5a, *infra*) (Emphasis supplied.)[15]

In other places in its opinion, however, the court seemed to adopt a broader view of Count II, construing the indictment to charge a conspiracy much larger in scope than the City-County construction conspiracy charged in Count I, namely, a conspiracy to bribe and extort in violation of New Jersey law. As the court observed:

> "It is entirely likely that neither the grand jury nor the federal prosecuting authorities have not to this day discovered every instance of bribery or extortion by the conspirators in violation of New Jersey law. But the conspiracy to violate § 1952 during the specified period was charged and was proved. The appellants cannot again be put in jeopardy for the same conspiracy even if *new instances of violations of the New Jersey bribery and extortion laws* in the same time period should now be discovered." (13a, *infra*) (Emphasis supplied.)[16]

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[15] Assuming that the Court of Appeals intended this interpretation of the indictment, one would read the later statement of the court that—

> "[t]he difference between [the two counts] was that for Count I the government had to establish effect on interstate commerce while in the other it had to establish use of the facilities of interstate commerce" (18a, *infra*)

as a complete acceptance of the government's representations prior to trial and in its brief on appeal that Count II was merely a jurisdictional restatement of Count I.

[16] This construction permitted the Court of Appeals to attempt to distinguish *Stirone, supra*, on the ground that there "the grand jury charged a *specific* substantive interference with interstate commerce and the government proved a different substantive interference" (12a-13a, *infra*) (Emphasis supplied); and *Kotteakos, supra*, on the ground that, unlike the present case, it involved multiple conspiracies rather than "one master conspiracy." (16a, *infra*). The implication is clear—if, as in this case, the charge is sufficiently vague so that an appellate court can redefine the conspiracy to embrace all the evidence, then *Stirone* and *Kotteakos* can be forgotten.

The Court of Appeals never settled on a definitive interpretation of the indictment. To say, as the court repeatedly does throughout the opinion, that there was a "single overall conspiracy," without defining the limits thereof, adds nothing to the inquiry and totally fails to resolve the basic question—i.e., what did the indictment charge?

The plain fact is that the Court of Appeals succumbed to the temptation afforded by an unconstitutionally vague indictment to construe that indictment so as to condone actions by the trial court which ran squarely afoul of this Court's admonition that—

> "If it lies within the province of a [trial] court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest changes, the great importance which the common law attaches to an indictment by a grand jury, . . . may be frittered away until its value is almost destroyed. . ."

*Russell, supra*, at 770-71, quoting from *Ex parte Bain*, 121 U.S. 1, 10 (1887), long recognized as the leading case defining the fundamental right to an indictment as charged by a grand jury.

In point of fact, the Court of Appeals could find no satisfactory answer to the contention that Count II, if it was more than a jurisdictional restatement of Count I, was unconstitutionally vague. As shown above, Count II had virtually no limits whatever, except the limits which a court or a prosecutor might choose to impose—it merely charged a conspiracy to bribe and extort in violation of New Jersey law. It left the scope of the indictment to the discretion of the prosecutor and the courts, the very evil condemned by *Russell*.

In the final analysis, all the Court of Appeals could do was to offer the specious argument that "the form

of the indictment was compelled by the nature of the conspiracy." (13a, *infra*) But, if *Russell* is to have any continuing vitality, this Court must make it clear that the fact that a conspiracy may be broad does not permit, much less require, an indictment which, by complete failure to define the limits of the conspiracy, gives the prosecutor a license to construe it as embracing any evidence which he may discover, and which permits the trial and appellate courts to condone such action.

## CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

W. A. SUTHERLAND
MAC ASBILL, JR.
JEROME B. LIBIN
RUFUS E. BROWN
MICHAEL L. DENGER
1200 Farragut Building
Washington, D. C. 20006
*Attorneys for Petitioner*

JULY 21, 1972

## CERTIFICATE OF SERVICE

This is to certify that the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was served upon respondent by delivery thereof to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D. C., this 21st day of July, 1972.

MAC ASBILL, JR.
*Counsel for Petitioner*

## APPENDIX A *

## UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 71-1886, 71-1887, 71-1888,
71-1889 and 71-1890

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UNITED STATES OF AMERICA

*v.*

JOHN V. KENNY, THOMAS WHELAN, THOMAS FLAHERTY, WALTER WOLFE, JOHN J. KENNY, WILLIAM STERNKOPF, JR., FRED KROPKE, FRANK G. MANNING, JOSEPH STAPLETON, PHILIP KUNZ, JAMES R. CORRADO, BERNARD MURPHY

WILLIAM A. STERNKOPF, JR.,
*Appellant in No. 71-1886*

FRED J. KROPKE,
*Appellant in No. 71-1887*

JOSEPH B. STAPLETON,
*Appellant in No. 71-1888*

PHILIP W. KUNZ,
*Appellant in No. 71-1889*

BERNARD MURPHY,
*Appellant in No. 71-1890*

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(D.C. Criminal No. 570-70)

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Argued February 18, 1972
Before VAN DUSEN, ADAMS and GIBBONS,
*Circuit Judges*

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* Numerous printing errors in the Third Circuit's slip opinion have been left unchanged in this Appendix.

*Appendix A*

## OPINION OF THE COURT

(Filed May 22, 1972)

GIBBONS, *Circuit Judge.*

On November 16, 1970 a federal grand jury in Newark returned a thirty-four count indictment against John V. Kenny, Thomas Whelan, Thomas Flaherty, Walter Wolfe, John J. Kenny, William Sternkopf, Jr., Fred Kropke, Frank G. Manning, Joseph Stapleton, Philip Kunz, James R. Corrado and Bernard Murphy. Prior to trial the defendants Frank G. Manning, and John J. Kenny (no relation to John V. Kenny and called hereinafter J. J. Kenny) were severed and were granted immunity pursuant to 18 U.S.C. § 2514. Corrado pleaded guilty to one count on May 21, 1971. During the trial, on June 11, 1971 John V. Kenny (hereinafter J. V. Kenny), because of physical inability to continue, was severed. At the close of the Government's case five counts of the indictment were dismissed on the motion of the Government. On July 5, 1971, the jury returned verdicts of guilty against seven of the eight remaining defendants on all twenty-nine remaining counts and against defendant Kunz on seventeen of those counts. Sentences were imposed on August 10, 1971 [1] and all defendants except Wolfe appealed. Thereafter the defendants Whelan and

[1] The court sentenced defendants Whelan, Flaherty and Murphy to terms of fifteen years imprisonment; defendant Sternkopf to a term of ten years imprisonment and a fine of $20,000; defendant Kropke to a term of five years imprisonment; defendant Stapleton to a term of two years imprisonment with eighteen months of that term suspended and three years probation; defendant Kunz to a term of two years imprisonment with eighteen months of that term suspended and two years probation; defendant Wolfe to a term of five years imprisonment with the entire term suspended and five years probation.

Flaherty withdrew their appeals. Thus of the twelve named in the indictment the appeals of five, Sternkopf, Kropke, Stapleton, Kunz and Murphy, are before us.

Count I of the indictment charges that each of the defendants, during the period from November 1, 1963 to the date of the indictment, conspired in violation of 18 U.S.C. § 1951 [2] to obstruct, delay, and affect interstate commerce by impeding construction undertaken on behalf of the City of Jersey City and the County of Hudson by contractors engaged in interstate commerce, in order to obtain the property of such contractors with their consent, which was induced both by the wrongful use of fear and under color of official right. Count II of the indictment charges that each of the defendants, during the period from November 1, 1963 to November 16, 1970, in viola-

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[2] "Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

tion of 18 U.S.C. § 371 [3] conspired to commit violations of 18 U.S.C. § 1952 [4] by using the facilities of interstate commerce to carry on an unlawful activity, that activity being the crimes of bribery and extortion in violation of the laws of the State of New Jersey. Thus the indictment charges violations of two separate federal conspiracy statutes; the specific prohibition in § 1952 against conspiracies to obstruct, delay or affect commerce (Count I) and the general prohibition in § 371 against conspiracies to commit an offense against the United States (Count II). The offense alleged against the United States in Count II is the substantive violation of § 1952—inter-

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[3] "Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[4] "Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime or violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means . . .

(2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

state travel to commit extortion or bribery in violation of state law. Section 1952, unlike § 1951, does not contain a specific prohibition against conspiracy. Section 1951 prohibits both substantive offenses and conspiracies. Counts III through XXXIV of the indictment each charges a separate substantive violation of § 1951 by the extortion of a specific sum of money from a specific contractor.

Each of the defendants was, or had been, a highly placed public official or political leader in Jersey City or Hudson County or both. It was the federal government's theory that each acting in concert with one or more of the others used his position to fasten upon both the city and county administrations a system whereby no one could do business with either without kicking back a percentage, usually 10%, of the contract price. According to the federal government this was achieved in three principal ways. First, the competitive bidding process was perverted by a "pre-qualification" arrangement which enabled the defendants to exclude from bidding contractors unwilling to kick back. Second, payments for work already done would be withheld until the kickback was made. Finally, on contracts not subject to competitive bidding the contract would not be awarded to anyone unwilling to kick back. At the head of this corrupt system, according to the federal government, was the defendant J. V. Kenny, who, although he held no public office or official party position in the years in question, was de facto the absolute boss of the political party in power. Under his leadership, it was contended, the defendants fastened a thoroughly meshed arrangement on both city and county administrations by which they subverted those governmental units into corrupt vehicles for their own private enrichment.

*Appendix A*

These contentions were amply proved by the testimony of numerous witnesses, but particularly by the testimony of the two defendants, Manning and J. J. Kenny, who as immunized witnesses detailed their own participation in the corrupt system, its methods of operation, its pervasiveness, and its long term success. The testimony of these acknowledged participants was corroborated in detail not only by the testimony of numerous victims, but by proof of the existence of substantial hoards of ill gotten gains accumulated by one or more of the participants. The proof in the record of the existence of a system for diverting the apparatus of city and county government to private, unlawful ends is overwhelming.

Each of the appellants, however, contends that as to him the proof was not all that overwhelming, that the government's case placed him at the periphery at best, and that he was prejudiced before or during the trial in various ways. Most of the appellants urge common legal and factual issues, and these will be so discussed. Where the situation of any appellant is unique specific reference will be made to him.

## I. Contentions with Respect to Discovery of the Government's Case

All defendants engaged in extensive pre-trial motion practice looking to discovery of the Government's case. That case was substantially documentary. The court ordered the Government, on defendants' motion, to permit them to inspect all tangible evidence related in any way to the case, to furnish in advance copies of any records which the Government might use at the trial and to furnish a copy of the grand jury testimony of each defendant who had testified before the grand jury. As it turned out, there was a room full of documents. This room was

kept open to the defendants six days a week prior to trial and even on Sunday during the trial. Several of the defendants contend that the court's approach was so overly liberal that they never made any meaningful use of the vast volume of materials made available. This contention is without substance. The nature of the conspiracy was such that it generated a great deal of tangible evidence, including $50,090.00 in currency, all of which was available for inspection. The only evidence which was not, pursuant to the court's order, available for inspection prior to trial, was evidence of certain transactions which did not come to the Government's attention until the trial was under way. The court gave the defendants an adequate opportunity during trial to prepare to meet any such later discovered evidence.

Several defendants contend that the court erred in denying their motion for a bill of particulars. The court in the exercise of its sound discretion declined to require the Government to answer a set of detailed interrogatories in the guise of a bill of particulars. This decision to permit liberal inspection of all tangible evidence placed a greater burden of preparation on the defendants than would have been the case had their suggested course, requiring answers to a detailed bill of particulars, been followed. This, however, was a matter within the discretion of the court. The court leaned heavily toward liberal discovery throughout the case, and the defendants cannot be heard to complain about the balance of the burden of preparation which it struck between the prosecution and the defense. Ample opportunity for preparation was available, and from the evidence in the record was in fact availed of.

Defendant Stapleton contends that the court erred in denying his motion, pursuant to Fed. R. Crim. P. 16(a), for a copy of the statements of Government witnesses

setting forth conversations with him. We rejected the same contention in *United States* v. *Fioravante*, 412 F.2d 407, 410 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1969). Rule 16(a) does not require the discovery of witness statements. Those statements are governed by the provisions of the Jencks Act, 18 U.S.C. § 3500. That statute was complied with during the trial.

Finally, defendants Kropke and Stapleton contend that it was error for the court to refuse discovery, prior to trial, of the contents of affidavits used to support the issuance of search warrants on October 8, 1971. The affidavit was on the Government's motion impounded in the interest of justice. The warrants directed the search of their offices. The defendants sought its inspection in connection with a proposed motion to suppress the fruits of the search. In response the United States Attorney urged that the motion to suppress be deferred until trial. He agreed to produce the affidavit at trial and represented that the Government would not object to the timeliness of the suppression motion at that time. Nevertheless Kropke and Stapleton made motions, pursuant to Fed. R. Crim. P. 41(e), for suppression. In response to these motions the United States Attorney stipulated that the Government would make no use of the materials seized in the search in its affirmative case at the trial. In effect the Government, rather than disclose the contents of the affidavits, consented to the suppression motion. In these circumstances the court refused to permit pre-trial inspection of the affidavits.

Stapleton and Kropke contend, nevertheless, that they were prejudiced by the use of the seized evidence before the grand jury. But a defendant may not challenge an indictment on the ground that illegally obtained evidence was presented to the grand jury. *United States* v. *Blue*, 384 U.S. 251 (1966); *United States* v. *Lawn*, 355 U.S.

339 (1968); *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Rundle*, 383 F.2d 421, 424 (3d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968); *United States* v. *Grosso*, 358, F.2d 154, 163 (3d Cir. 1966); *rev'd on other grounds*, 390 U.S. 62 (1968). Stapleton and Kropke urge that the rule of these cases was changed by our decision in *In Re Grand Jury Proceedings, Harrisburg, Pennsylvania*, 450 F.2d 199 (3d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3279 (U.S. Dec. 14, 1971). That case turns on the provisions of a specific statute, 18 U.S.C. §§ 2514, 2515, and involves the standing of a witness, in that capacity, to refuse to testify before a grand jury. That issue is not presented in this record. Nothing in the *Harrisburg Grand Jury* case reflects upon the continuing validity of the rule of *Blue, Lawn* and *Costello* that a defendant cannot challenge an indictment on the ground that it was based on illegally obtained evidence.

In connection with the search warrant contentions of Stapleton and Kropke the federal Government makes the additional point that its consent to the suppression motion was not an acknowledgment that the affidavits were insufficient. The consent was made solely for the purpose of avoiding a revelation of the identity of a potential witness. It urges that an examination of the affidavits will disclose compliance with the formula set forth in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), explained in *Spinelli* v. *United States*, 393 U.S. 410 (1969) and possibly contracted in *United States* v. *Harris*, 403 U.S. 573 (1971). Because we hold that *Blue, Lawn* and *Costello* control we do not reach that contention. At a later point we will discuss the use which was made at the trial of the materials seized pursuant to the warrants.[5]

[5] *See* pp. 30-31, 35-36 *infra*.

*Appendix A*

## II. Contentions Addressed to the Indictment

The appellants make a series of contentions addressed to the form of the indictment, the claimed variance of the proofs from the charge and the joinder of issues and parties. These may be categorized under the headings of vagueness, duplicity, variance and prejudicial joinder.

### Vagueness

Sternkopf and Kropke urge that Count II of the indictment is vague as to contravene both the fifth and the sixth amendments. Kropke also contends that Count I is unconstitutionally vague. All the appellants have joined in these contentions.

The attack upon Count I requires no prolonged discussion. It is identical in all material respects with that approved in *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3395 (U.S. Feb. 22, 1972). Count II charges that the defendants:

> ". . . did knowingly . . . conspire . . . with each other, and with other persons . . . to commit certain offenses . . . in violation of Section 1952 of Title 18 . . . in that the defendants and said co-conspirators would travel and wilfully cause others to travel in interstate commerce and that they would use and wilfully cause others to use the facilities in interstate commerce . . . to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activing being the crimes of bribery and extortion in violation of the laws of the State of New Jersey, and it was further part of said conspiracy that the defendants would thereafter perform and cause others to perform acts of promoting . . . of said unlawful activity and acts facilitating the promoting . . . of said unlaw activity."

*Appendix A*

Section 1952 in relevant part reads:

> "(a) Whoever travels in . . . or uses any facility in interstate . . . commerce . . . with intent to—
>
> * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any acts specified in [subparagraph] . . . (3) shall be fined . . . or imprisoned . . .
>
> (b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery or arson in violation of the laws of the State in which committed . . ."

A substantive violation of § 1952(a)(3) thus requires proof of interstate travel or use of interstate facilities with intent to promote extortion or bribery followed by attempts to perform such extortion or bribery. The indictment alleges all elements of this substantive offense in the language of § 1952. It charges a conspiracy to violate that section between November 1, 1963 and the date of the indictment, and it alleges further that part of the conspiracy was the performance of other acts for the purpose of concealment.

Appellants contend that this indictment was so vague that it permitted the federal government to prove any extortion or bribery participated in by the alleged conspirators in violation of New Jersey law in the specified time period. This, they contend left the prosecutor free to prove offenses which had never been considered by the grand jury, thereby violating the fifth amendment guarantee that an accused charged with a serious crime be tried only on an indictment of a grand jury. They contend, moreover, that Count II did not set forth a "plain, concise and definite written statement of the essential

facts constituting the offense charged," Fed. R. Crim. P. 7(c), and thus violated their sixth amendment guarantee that they be informed of the "nature and cause of the accusation."

We hold that Count II complied with the standards set forth in *Hagner* v. *United States*, 285 U.S. 427, 431 (1932) and *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927). *See United States* v. *Dreer*, No. 71-1514 (3d Cir., filed Mar. 9, 1972). It charges the statutory crime in the language of the statute. It specifies the time period during which the conspirators are claimed to have acted. It both apprises the appellants of the charges against them and protects them against any future double jeopardy. *See United States* v. *Dreer*, *supra*; *United States* v. *Addonizio*, *supra*; *Vandersee* v. *United States*, 321 F.2d 57 (3d Cir. 1963); *United States* v. *Palmiotti*, 254 F.2d 491, 495 (2d Cir. 1958); *United States* v. *Achtner*, 144 F.2d 49, 51 (2d Cir. 1944). In affording such protection the indictment in this case differs crucially from that found defective in *United States* v. *Raysor*, 294 F.2d 563 (3d Cir. 1961). The contention that it permitted the proof of offenses not permitted to the grand jury is without substance. The federal government was required to offer to the grand jury some proof of the ongoing conspiracy alleged in Count II. It was not required to offer proof of every violation of New Jersey law which occurred as a result of that ongoing conspiracy. Evidence of some such violations did not come to the attention of the prosecuting authorities until after the indictment was returned. This evidence was, however, probative of the overall continuing conspiracy which the grand jury charged. Thus this case is not at all like *Stirone* v. *United States*, 361 U.S. 212 (1960), in which the grand jury charged a specific substantive interference with interstate commerce and the

government proved a different substantive interference. Indeed the form of the indictment was compelled by the nature of the conspiracy. It was a conspiracy to exact a toll from everyone who could be made amenable to such an exaction by virtue of the defendants' control of the administrative apparatus of local government. It is entirely likely that neither the grand jury nor the federal prosecuting authorities have not to this day discovered every instance of bribery or extortion by the conspirators in violation of New Jersey law. But the conspiracy to violate § 1952 during the specified period was charged and was proved. The appellants cannot again be put in jeopardy for the same conspiracy even if new instances of violations of the New Jersey bribery and extortion laws in the same time period should now be discovered.

Duplicity

Appellants urge that because the federal government's position at all times was that there was a single overall conspiracy they were prejudiced by the fact that they were charged with two separate conspiracy counts. The maximum sentence under § 1951 is twenty years, and none of the defendants received a sentence in excess of twenty years. A single general sentence was imposed. Since each sentence was less than the maximum permitted under § 1951 the judgment should be upheld if conviction on the § 1951 count is sustainable. *Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959); *Roviaro* v. *United States*, 353 U.S. 53, 55-56 (1957); *Whitfield* v. *Ohio*, 297 U.S. 431, 438 (1936); *Claassen* v. *United States*, 142 U.S. 140, 147 (1891); *Peoples* v. *United States*, 412 F.2d 5 (8th Cir. 1969) and cases cited therein.

We need not rest affirmance on that ground alone, however. The single overall conspiracy violated two separate

federal statutes prohibiting conspiracies. Count I charges a violation of the conspiracy prohibition in 18 U.S.C. § 1951—conspiracy to interfere with interstate commerce. Count II charges a violation of the general federal conspiracy statute in 18 U.S.C. § 371—conspiracy to violate a federal statute, in this case 18 U.S.C. § 1952, by conspiring to use the facilities of interstate commerce to violate state law. Count I required proof of interference with interstate commerce by extortion. Count II required proof of use of the facilities of interstate commerce. So long as each required proof of a fact not essential to the other, even though the charges arose from a single act or series of acts, or as here a single conspiracy, the defendants could be convicted of both. *Pereira* v. *United States*, 347 U.S. 1, 9 (1954); *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45 (1952); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *United States* v. *Noveck*, 273 U.S. 202, 206 (1927); *Gavieres* v. *United States*, 220 U.S. 338 (1911); *United States* v. *Samuel Dunkel & Co.*, 184 F.2d 894 (2d Cir. 1950); *cert. denied*, 340 U.S. 930 (1951); *cf. United States* v. *Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969). Separate federal interests were invaded by the separate violation of two conspiracy statutes by a single conspiracy. *See American Tobacco Co.* v. *United States*, *supra* at 787.

Moreover each of these statutes permits a different range of sentence.* It was proper to charge both violations as separate counts of the indictment.

## Variance

The appellants contend that their convictions should be reversed because of a fatal variance between the proofs

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* Not more than twenty years and not more than $10,000 under 18 U.S.C. § 1951; not more than five years and not more than $10,000 under 18 U.S.C. § 371.

adduced at trial and the indictment. To put this argument in perspective it must be recalled that in addition to the two conspiracy counts the indictment alleged thirty-two separate substantive counts charging separate extortive transactions with interstate contractors or suppliers in violation of 18 U.S.C. § 1951. Evidence was offered tending to prove twenty seven of these counts, and most of that evidence tended to show concert of action between one or more of the defendants and hence to prove Count I. Evidence was offered with respect to many of these same transactions tending to prove that one or more of the defendants acting in concert caused the facilities of interstate commerce to be used in furtherance of the extortion, and hence to prove Count II. Thus this is not a case where there was no evidence of the existence of a conspiracy. *Compare United States* v. *DeCavalcante*, 440 F.2d 1264 (3d Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3221 (U.S. Nov. 9, 1971). The appellants claim, however, that although there was ample proof of concert of action, and ample proof of substantive violations of 18 U.S.C. § 1951, and ample proof of use of the facilities of interstate commerce, and ample proof of bribery and extortion in violation of New Jersey law, the Government in fact proved several separate unrelated conspiracies under each conspiracy count. They argue that the proof established a Jersey City conspiracy to extort from contractors, a separate Jersey City conspiracy to extort from gamblers, a Hudson County conspiracy to extort from contractors, a separate conspiracy to extort from J. Rich Steers Company in connection with a Port of New York Authority contract, and a separate conspiracy to extort from Di Feo Motors. They urge that it was improper to lump together in one indictment several conspiracies, *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and that by permitting proof of separate

conspiracies the court permitted the Government to amend the indictment without resubmission to the grand jury. *Russell* v. *United States*, 369 U.S. 749 (1962).

*Kotteakos* prohibits charging multiple unrelated conspiracies, but it does not prohibit charging one master conspiracy and establishing at trial that under the master conspiracy more than one subsidiary scheme was involved. *Blumenthal* v. *United States*, 332 U.S. 539 (1947). Explaining *Kotteakos* in *Blumenthal* Justice Rutledge wrote:

> "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single over-all comprehensive plan." 332 U.S. at 558.

Here there is ample evidence of a large general scheme, and of aid given by some conspirators to others in aid of that scheme. Each of the appellants was connected by evidence to the large general scheme. At the head of the scheme was J. V. Kenny who, the evidence suggests, ruled the political life of both city and county. Each of the remaining defendants held an official position in city or county government as a result of membership in J. V. Kenny's organization. He effectively determined who would hold public office in either government and he organized a system to insure that all contractors working on a public project would kickback a percentage of the contract price to a designated bagman. Generally speaking members of the city government would collect kickbacks from city contractors and members of the county

government would collect from county contractors. But the roles played by various conspirators varied from time to time. Thus city collector Murphy was at one point replaced by Manning, who in turn was replaced by Flaherty. County collector Schlosberg was at his death replaced by J. J. Kenny, who was in turn replaced, after a falling out with J. V. Kenny, by Manning, who was eventually replaced by Wolfe. Manning, as County Engineer on occasion collected from firms which were performing city work. J. J. Kenny, a County Freeholder, on occasion collected from firms which were performing city work. The pattern of conduct reflected in the evidence is that of a determined group who repeatedly cooperated closely to achieve the common purpose of self-enrichment by extracting kickbacks. The key to success of all their depravities was their common control over the administration of city and county government under the leadership of J. V. Kenny. Without detailing all of the transactions, evidence about Ashland Oil Company, the subject of one of the substantive counts, discloses the typical common ingredients. J. V. Kenny ordered the extortion; Sternkopf made the original demand. Sternkopf recruited Manning to make the collection, and Manning collected the money and turned it over to Wolfe. When the conspirators learned that Schuster, an Ashland employee, was appearing before the federal grand jury, Wolfe gave cash to Kropke to return to Schuster. Kropke attempted to do so but could not reach Schuster. He then returned the cash to Wolfe who returned it to Stapleton.

Manning and J. J. Kenny, the immunized co-conspirators, described the "system" or "official family" and the role of each defendant in it. It is clear from the evidence that none of the so called separate conspiracies could have operated except for the existence of the overall con-

spiracy charged by the grand jury. The court clearly charged that each defendant had to be connected with this overall conspiracy. This case is like *Blumenthal* v. *United States, supra,* rather than like *Kotteakos* v. *United States, supra,* upon which appellants rely.

Prejudicial Joinder

The appellants urge that the joinder Counts I and II of the indictment was improper under Fed. R. Crim. P. 8 (a) and that the joinder of defendants was improper under Fed. R. Crim. P. 8(b). They contend that the district court erred in denying their Rule 14 motions for severance of offenses and for separate trials. These severance claims are predicated chiefly upon the allegedly prejudicial effect of evidence admitted against some defendants which in the view of one or more of the appellants was inadmissible against him. Kunz and Kropke further contend that since they played only a minor part in the conspiracy their severance should have been ordered. We find no abuse of discretion. *United States* v. *Weber,* 437 F.2d 327, 331-32, 340 (3d Cir. 1970), *cert. denied,* 402 U.S. 932 (1971); *United States* v. *Barrow,* 363 F.2d 62, (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

The evidence on the two conspiracy counts was essentially the same. The difference between them was that for Count I the government had to establish effect on interstate commerce while in the other it had to establish use of the facilities of interstate commerce. No possible prejudice arose from such evidence. It is true that Count II permitted greater latitude in proving substantive offenses against New Jersey law, since, if use of the facilities of interstate commerce was shown the Government could, and did, prove extortion from persons en-

gaged in activities essentially intrastate. But the extortions in question were of the same character and grew out of the same overall conspiracy. Each involved misuse of the instrumentalities of government upon which the conspirators had fastened themselves. It was, therefore, no abuse of discretion to deny the motions to sever Counts I and II.

We turn, then, to the contention that some of the appellants should have been granted separate trials because of the prejudicial effect of evidence admitted against others which would be inadmissible against them. For two reasons we reject this contention. First, the mere possibility that in a joint trial some evidence may be admitted against one defendant which is inadmissible against another is not in itself a sufficient reason for multiple trials growing out of a closely related series of transactions. The prospect that certain evidence will be admissible against one defendant but not against another is a feature of all joint trials. Fed. R. Crim. P. 8 recognizes that this is a possibility, and Rule 14 commits to the sound discretion of the trial court the balancing of the inconvenience to the Government and the judicial process of numerous separate trials against the inconvenience to the defendants of seeking appropriate limiting instructions. *See, e.g., United States* v. *Barber*, 442 F.2d 517, 529 (3d Cir. 1971), *cert. denied*, 404 U.S. 958 (1971). There is no abuse of this discretion in the instant case. Second, the granting of separate trials would not have significantly benefited the defendants who now complain. They would not have been able to compel self incriminating testimony of those co-defendants who in this trial declined to testify. *Counselman* v. *Hitchcock*, 142 U.S. 547, 562 (1892). *See generally United States* v. *Housing Foundation of America*, 176 F.2d 665 (3d Cir. 1949). There was some evidence linking each de-

fendant to the conspiracy. *See United States* v. *Cohen*, 197 F.2d 26 (3d Cir. 1952). Thus the evidence of acts of all the co-conspirators in furtherance thereof would be admissible against them. *See, e.g., United States* v. *Weber, supra; Baker* v. *United States*, 401 F.2d 958, 974 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); *Drew* v. *United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

The real thrust of the appellants' objections to their joint trial is that the rules of evidence pertaining to conspiracy trials operated harshly, particularly because the out-of-court declarations of each co-conspirator became admissible against each other co-conspirator. We are, of course, mindful of the dangers of unfair guilt by association involved in the law of criminal conspiracy. In the instant case, however, there was evidence linking each of the appellants to the conspiracy, although in varying levels of participation.[7] In these circumstances, the evidence rules applicable to conspiracy trials did not operate unfairly. Indeed, this case illustrates the pervasive danger to the community of conspiratorial associations and thus hardly presents a sympathetic vehicle for the reconsideration of the co-conspirator admissions rule, even if we, as opposed to a higher authority, were free to change that rule.

## III. Contentions Addressed to Admissibility of Evidence in the Government's Case

All the appellants complain about various items of evidence admitted during the Government's case. Much of the evidence consisted of shocking revelations by the two immunized co-conspirator defendants, J. J. Kenny and Manning.

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[7] These degrees of participation were recognized in the varying sentences imposed. *See* Note 1 *supra*.

*Appendix A*

## A. Evidence of Concealed Wealth

Among the more sensational items of evidence were those establishing the existence of large concealed wealth in the possession or control of one or more of the alleged conspirators. The court admitted in evidence $700,000 in bearer bonds belonging to J. V. Kenny. It admitted evidence of a secret numbered bank account in Miami, Florida, controlled by Whelan and Flaherty, containing $1.2 million. It admitted in evidence $50,090.00 in currency which was given by J. V. Kenny to J. J. Kenny in February 1971, after the indictment, for the purpose of "investigating" and "discrediting" Manning, who by then was suspected of being a potential witness. It admitted testimony that Sternkopf assisted J. J. Kenny to invest substantial funds which the Government contends were proceeds of the crimes charged.

Appellants urge, on the authority of *Williams* v. *United States*, 168 U.S. 382 (1897) that all the foregoing evidence was improperly admitted because no connection was shown between the possession by the defendants of the sums specified and the extortions for which they were indicted. We have held that sudden unexplained acquisition of wealth at or about the time of the offense charged establishes a sufficient nexus to satisfy the rule of *Williams, supra. See United States* v. *Chaney*, 446 F.2d 571 (3d Cir. 1971); *United States* v. *Jackson*, 403 F.2d 647, 649 (3d Cir. 1968), *cert. denied*, 394 U.S. 949 (1969); *United States* v. *Howell*, 240 F.2d 149, 158 (3d Cir. 1956). We have also held that evidence of a desire to conceal a large sum of money shortly after a crime sufficiently establishes the connection required by *Williams*. *United States* v. *McKenzie*, 414 F.2d 808 (3d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970). *See also United States* v. *Jackskion*, 102 F.2d 683 (2d Cir.), *cert. denied*,

307 U.S. 635 (1939); *Commonwealth* v. *Mulrey*, 170 Mass. 103, 49 N.E. 91 (1898). Measured by the rules which this circuit has followed there was in each of the four instances complained of sufficient evidence connecting the money to the conspiracy.

(1) The J. V. Kenny Bonds

J. V. Kenny arranged during the pendency of the charged conspiracies surreptitious transfers of currency for the acquisition of bonds, through the Trust Company of New Jersey, utilizing the services of Kropke and Sternkopf. Brill, an officer of the Trust Company of New Jersey, testified that Sternkopf called him on the telephone to arrange for the purchase of $200,000 worth of New Jersey Turnpike Bonds. Sternkopf told Brill that a representative of J. V. Kenny would arrange for payment. On October 4, 1966 Kropke brought to the bank $200,870.84 in currency. J. V. Kenny later personally picked up the bonds from Brill after they were delivered to the bank by Lehman Brothers, the underwriter. An official of Lehman Brothers, Ragsdale, testified that after the purchase he had a conversation with Sternkopf in which Sternkopf expressed extreme displeasure over the fact that Lehman Brothers put J. V. Kenny's name on the bill. Sternkopf directed Lehman Brothers "never to put John V. Kenny's name on any such bill" in the future. In May, 1967, J. V. Kenny decided to purchase $200,000 worth of City of New York bonds. Kropke brought Brill $200,000 in currency. After receipt of the bonds from New York Brill personally delivered the bonds to J. V. Kenny at Corrado's office in Pollak Hospital. In April, 1968, Sternkopf telephoned Brill regarding the purchase of $100,000 of County of Loran, Ohio, bonds. Brill went to Sternkopf's office, and Sternkopf gave him $102,365.97 in currency, Brill delivered the bonds to Stern-

kopf. In July 1968 Sternkopf again called Brill and arranged for the purchase of $200,000 worth of New Jersey Turnpike bonds. Brill arranged for the delivery of the bonds from New York and delivered them personally to Sternkopf, receiving $200,000 from him in currency.

Brill testified that all the bonds were "bearer bonds", that all were delivered from New York (as charged in Count II), that in each instance the Trust Company of New Jersey as agent for J. V. Kenny paid for the bonds by a bank treasurer's check, thus concealing the fact that J. V. Kenny had available for such purchases during the period when the conspiracy was operating over $700,000 in currency. There was evidence that all kickbacks were made in currency. These transactions were amply connected to the conspiracy. *United States* v. *McKenzie, supra; United States* v. *Jackskion, supra.* They were evidential of the knowledge and participation of Kropke and Sternkopf in that conspiracy. *United States* v. *Addonizio,* 449 F.2d 100, 102 (3d Cir. 1971); *United States* v. *Barrow,* 363 F.2d 62 (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

(2) The Whelan and Flaherty Accounts

The immunized defendant, Manning, testified:

"Q. Did you ever have any conversation with defendant Flaherty in reference to any of the proceeds of the contractors' envelopes?

A. Yes, sir, I did.

* * * *

Q. In substance what did the defendant Flaherty say to you and what did you say to him?

A. He and Mayor Whelan were very disturbed about the opposition on the Hill, referring to the County organization, that they think we are stupid. They are the stupid ones. They stashed their cash in local banks. He said that we put ours in the bank owned by a friend of mine outside the State. (Tr. 3985)."

Later in the trial Dennis Clum, senior Vice President in charge of the Trust Department of the Miami Beach First National Bank testified that James Rogers of that bank, formerly an officer of the First National Bank of Jersey City, introduced him to Flaherty at his office in Miami on November 14, 1968. Flaherty asked if the bank would open a custodial account which would be identified by a number so that his name would not be associated with the account. Clum advised that the bank could open such an account. Flaherty then opened a brown attache case which contained $281,000 in municipal bearer bonds and $242,897 in currency, for a total of $523,897. On many of the bearer bonds the interest coupons had not been clipped since 1966. The accumulated uncollected interest was about $13,000. On September 12, 1969 Flaherty returned to Clum's office, this time in the company of Whelan. Flaherty introduced Whelan and said he wanted to open a similar numbered account in which his name would not be disclosed. Whelan had in his possession municipal bearer bonds of a face amount of $502,000. A numbered custodial account was opened for him. Flaherty instructed the bank to transfer bonds of an equivalent amount of $45,000 from his account to Whelan's. Thereafter on another occasion Whelan and Flaherty came to the bank with their wives and executed agreements whereby each of them and their respective wives would have the right to add to or withdraw from the other's account. On February 2, 1970 Whelan deposited $35,000 in cur-

rency in his numbered account and Flaherty deposited $40,000 in currency in his numbered account. On May 13, 1970 Whelan and Flaherty each deposited $30,000 in currency in their respective numbered accounts.

In late May or June 1970, after the federal grand jury investigation of Hudson County and Jersey City had begun, Flaherty called Clum and said he wanted to close both accounts. He told Clum he would send Atkinson, a Jersey City police sergeant, to Miami to pick up authorizations for his and Whelan's signatures. Atkinson went to Florida, picked up the authorization forms, returned to Jersey City and obtained the signatures of Whelan and Flaherty. He returned to Florida on June 12, 1970 with a large suitcase and the executed authorizations. Clum delivered to Atkinson from Flaherty's account $571,000 of face value municipal bearer bonds, a check on principal cash in the amount of $30,025 and a check representing accumulated income of $13,270.36, or a total of $614,-295.36. From Whelan's account he delivered municipal bearer bonds in face amount of $577,000, a check drawn on principal cash in the amount of $35,025, and a check representing accumulated income of $6,112.94 or a total of $618,137.94. The four checks totaling $84,433.30 had not been negotiated when Clum testified on June 22, 1971.

Manning's testimony connected Flaherty's and Whelan's out of state bank accounts with the conspiracy. But aside from that testimony the existence of large and unexplained amounts of cash and bearer bonds simultaneously with the offenses and the efforts at concealment provide an ample nexus with the conspiracy. *United States* v. *Chaney, supra; United States* v. *McKenzie, supra; United States* v. *Jackson, supra; United States* v. *Howell, supra.* Indeed the efforts at concealment of the

cash hoards were, as alleged in Count II of the indictment, for the purpose of hiding and concealing the purposes of and acts in furtherance of the conspiracy.

(3) The Cash Given by J. V. Kenny to J. J. Kenny

The immunized defendant J. J. Kenny testified that on February 3, 1971 after the indictment, and at a time when he had broken with the organization headed by J. V. Kenny, and before he began cooperating with the Government, he met with J. V. Kenny at Newark Airport and asked J. V. Kenny for $50,000. He told J. V. Kenny that he needed this sum to hire investigators and accountants.

> "Q. Did you tell him why you wanted to hire investigators and accountants?
>
> A. Yes, I told him I needed the money and I wanted to spread it to a fellow by the name of Frank Manning." (Tr. 1096-97)

Three days later J. J. Kenny received a message from someone named Pandolphi, telling him to go to a garage. He went to the garage and Pandolphi gave him $50,090 in currency. Thereafter he began cooperating with the Government and he turned the money over to the United States Attorney. Each bill was marked, and the $50,090 was offered and received in evidence. Frank Manning, of course, is the other immunized co-defendant. J. J. Kenny testified that he discussed with J. V. Kenny the use to which the money was to be put.

> "THE WITNESS: The purpose was to hire investigators, accountants, to discredit Mr. Manning.
>
> Q. Was there any discussion as to why you wanted to discredit Frank Manning?
>
> * * * *

THE WITNESS: The discussion was to discredit Mr. Manning. He was one of the defendants at the time.

Q. Did you have any discussion with Mr. John V. Kenny as to why Manning should be discredited?

• • • •

THE WITNESS: The discussion was that he was the party that we had to discredit." (Tr. 1116-1118)

The appellants urge that the admission of the foregoing testimony and evidence was grounds for a mistrial. They contend that it was perfectly proper for J. J. Kenny, in connection with the preparation of his defense to the indictment, to hire "investigators and accountants" to discredit Manning, and that it was perfectly proper for J. V. Kenny to give J. J. Kenny $50,090 for this purpose. The evidential use to which the Government put the funds, they contend, somehow infringed the right of J. J. Kenny and J. V. Kenny to prepare a defense. But neither Kenny is before us advancing this contention, and the prejudice, if any, must have been to the appellants before us for us to consider it.

The issue is whether the testimony was properly admissible against anyone, since on the record in the district court it is clear that the objections made on behalf of the appellants were to any admission of the evidence. There was no request for a limiting instruction to the effect that the testimony and the currency could only be considered against some defendants.[8]

It is clear that the furtive transfer of $50,090 in currency from one conspirator to another conspirator for the purpose of discrediting a potential government witness

[8] At the time J. J. Kenny gave the testimony from which the excerpts quoted above were taken defendant J. V. Kenny had not been severed.

certainly was evidence of consciousness of guilt on the part of the two defendants who participated in the transactions, and thus was admissible against the defendant J. V. Kenny. Next, the ready availability of a $50,090 hoard of currency was highly corroborative of the testimony of J. J. Kenny that the conspirators had extorted millions of dollars of currency which they secreted for their own use. Thus the evidence corroborated his testimony about the operation and success of the system which he described. As such it was admissible on the conspiracy counts against all the conspirators. Finally, the ready availability to one of the conspirators of $50,090 in cash and its transfer to another conspirator at a time shortly after the period during which the conspiracy is alleged to have continued,[9] as with other evidence of large unexplained hoards of currency, tended to establish the offenses charges. *United States* v. *Chaney, supra; United States* v. *McKenzie, supra; United States* v. *Jackson, supra; United States* v. *Howell, supra.*

Moreover the clandestine transfer of $50,090 in currency from one conspirator to another certainly suggests an effort to conceal its existence. Appellants urge that the only possible construction which may be placed on the testimony is that the money was for legitimate pre-trial preparation by J. J. Kenny. Arguably that was the case, but the circumstances suggest Judge Learned Hand's aphorism, "[t]here may be honor among thieves, but there is no maudlin munificence." *United States* v. *Compagna*, 146 F.2d 524, 530 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

Testimony about the $50,090, and the currency, were properly admitted.

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[9] Count II alleges that the conspiracy began on or about November 1, 1963 and continued up to and including the date of the indictment.

(4) The Investments in C.E.W. Corporation Made By J. J. Kenny with Sternkopf's Help.

Sternkopf in particular claims that it was error to admit evidence that he assisted J. J. Kenny in making a concealed investment in C.E.W. Corporation. To put that objection in context it should be recalled that there is other evidence connecting Sternkopf to the conspiracy as early as October 1966. See p. 20 *supra*. Moreover before the evidence now complained of was admitted J. J. Kenny had testified about specific extortive transactions involving J. Rich Steers Corporation in which Sternkopf was a participant. Early in 1967, while Sternkopf was the Vice Chairman of the New Jersey Turnpike Authority, Galano, of the Steers firm, told J. J. Kenny he had been to see J. V. Kenny about obtaining a ten million dollar contract with that Authority, that he was interested in turnpike work, and that J. J. Kenny was to see if he could get it for Steers. J. J. Kenny met with Sternkopf and they agreed the Turnpike Contract was worth $50,000.00. J. J. Kenny then met with Galano and Rau, the president of Steers, and negotiated for a $50,000 kickback. Steers got the job and beginning in January 1968 paid the money in installments. One half of each installment was paid to Sternkopf and the other half to Stapleton, the treasurer for the system. Though the payments were made in 1968, Sternkopf's participation began in early 1967. The C.E.W. transaction took place in 1967. J. J. Kenny told Sternkopf that he had some "cash" he wanted to invest. Dooley, J. J. Kenny's brother-in-law, had succeeded Sternkopf as Clerk of the Hudson County Board of Chosen Freeholders on Sternkopf's recommendation. J. J. Kenny told Sternkopf he wanted Dooley to act as his agent in the investment. He gave Dooley $65,000 in currency and a $16,000 check which he had obtained from a friend in exchange for $16,000

in currency. A property in South Jersey was purchased in the name of "C.E.W. Corporation" with Clarence Sprinkle, Edward Dooley and William Sternkopf disclosed principals. Dooley, however, was a nominee for J. J. Kenny, because, as Kenny declared, "I couldn't show that kind of cash." (Tr. 1079). Sternkopf made the arrangements, transmitted the cash and the $16,000 check for purposes of closing and received a twenty per cent interest in C.E.W. without making any investment.

Sternkopf would have us hold that the cash invested in C.E.W. was not sufficiently connected with the conspiracy, and improperly tied him into admitted extortions by J. J. Kenny. There was, however, ample evidence that in 1967 Sternkopf was a knowing participant in the system and in the efforts of its members to secrete the proceeds of their joint efforts.

When he took the stand in his defense Sternkopf insisted that J. J. Kenny was not a principal in C.E.W., and that he was merely aiding Dooley, a legitimate businessman. The J. J. Kenny version differs. It made Sternkopf a knowledgeable participant in efforts to conceal the fruits of the conspiracy. The conflict between the two versions was for resolution by the jury.

The evidence of concealed wealth was in each instance properly admitted.

B. The Di Feo Testimony

J. J. Kenny testified, without objection, that Di Feo Buick sold tires and cars to Hudson County and to Jersey City and that the owner, Sam Di Feo made kickbacks to him which, pursuant to the arrangements of the system, he turned over to Stapleton. (Tr. 1007-8). Di Feo, called by the Government, demanded and received im-

munity. Without objection he testified that he gave cash kickbacks to J. J. Kenny on cars sold to Hudson County, on cars sold to Jersey City to Murphy, and on cars ordered by Kunz for the Jersey City Sewerage Authority to Flaherty. Still without objection he testified:

"Q. In 1969 what position, to your knowledge, did Fred Kropke hold in Hudson County?

A. He was the Chief of Police for the County.

Q. Did there come a time when you had any dealings with him in reference to some police cars for the Hudson County Police Department?

A. Well, he ordered ten police cars and I delivered the police cars. After that I had to give him two other cars, one was for himself and one was for Captain Robbins.

* * * *

"Q. Did the defendant Kropke give you any instructions as to the bill for the Datsun for himself and the Oldsmobile for Captain Robbins?

A. He instructed me to bill these things to the County.

Q. Did he tell you how to bill it to the County?

A. As police cars." (Tr. 2103-04)

The Government then offered Exhibit 2165, the invoice to the County for the two cars falsely described as Buick specials. For the first time the defendants objected to the admission of the exhibit on the grounds of relevancy. The objection was overruled and the invoice received in evidence. Di Feo then testified without objection:

"Q. Did Chief Kropke tell you why he wanted the invoice filled out that way?

A. So the County could pay for both cars." (Tr. 2105)

The invoice, amounting to $5,327.80, was paid by the county.

There was no request for any limiting instruction at the time of the testimony, and no objection to the testimony. On appeal several defendants urge plain error. Fed. R. Crim. P. 52.

We see none. Clearly the kickback testimony was proof of the existence of the conspiracy alleged in Count II. These were crimes of extortion or bribery under the laws of the State of New Jersey. The testimony with respect to the false invoices for cars delivered to Kropke and Robbins did not, technically, establish the offense of extortion or bribery under New Jersey law, since Di Feo was paid by the County. The district court recognized as much when at the end of the case it charged:

> "Ladies and gentlemen, my attention has been directed to the fact that I said the property in question here was money and in the case of Di Feo automobiles. Upon giving further thought to this I will eliminate 'automobiles,' because I do not recall any testimony of an instance where Mr. Di Feo didn't get paid for the automobile. Regardless of where the automobile went afterwards the County paid for it, but the automobile wasn't extorted from him. There is evidence that money was extorted from him." (Tr. 6833).

Kropke was a member of the official family who owed his position as Chief of the Hudson County police to J. V. Kenny. He was deeply involved in J. V. Kenny's efforts to conceal the cash loot of the conspiracy. He was in the position to perpetrate the venal fraud described in the Di Feo testimony only because the system of which he was

a part had diverted the administration of county government to its private ends. Even if the Di Feo-Kropke transaction is regarded as a separate sub-conspiracy it is adequately connected to the one grand conspiracy in which all the defendants joined under the leadership of J. V. Kenny. *Blumenthal* v. *United States, supra.*

Moreover, against Kropke, the evidence, even if considered not a part of the overall conspiracy charged, was admissible, within the discretion of the trial court, as proof of motive, opportunity, intent, plan, knowledge and absence of mistake. *See* Rule 4-04, *Proposed Rules of Evidence for the United States District Courts* and Magistrates (1971); *United States* v. *Hamilton*, No. 71-1400 (3d Cir., filed Feb. 14, 1972); *United States* v. *Weiler*, 385 F.2d 63 (3d Cir. 1967); *United States* v. *Klass*, 166 F.2d 373 (3d Cir. 1948). The appellants can hardly claim there was an abuse of such discretion when by failing to object they never presented the issue to the district court.

Finally, even if the evidence were not properly admissible against Kropke, and we have held otherwise, its admission against him, with no request for a limiting instruction from the remaining defendants, is as to all of them at worst harmless error, Fed. R. Crim. P. 52(a), rather than plain error. Rule 52(b).

## IV. Contentions Addressed to the Government's Cross Examination of Defense Witnesses

The appellants contend that several prejudicial errors took place during the Government's cross examination of defense witnesses.

*Appendix A*

A. Use of Suppressed Materials

We have referred heretofore, to the fact that the Government, rather than disclosing the contents of affidavits used to obtain search warrants, agreed that it would make no use of the materials seized in its affirmative case. The searches and seizures were made at the offices of Stapleton and Kropke. Both took the stand and testified. Both were confronted on cross examination with the seized materials in order to impeach their direct testimony. Both acknowledge that the seized evidence could, despite the Government's consent to suppression, be used for impeachment purposes. *Harris* v. *New York*, 401 U.S. 222, 226 (1971); *Walder* v. *United States*, 347 U.S. 62, 65 (1954). Both now contend that their direct testimony was in no way impeached by the seized evidence and that its use was therefore improper. The record discloses, however, that the testimony of each was substantially misleading and that the use made of the seized evidence was in the case of both properly impeaching. Moreover in Stapleton's cross examination the first reference to the seized materials was volunteered by him. There was no error in the use made of the suppressed materials on cross examination.

B. The Larner Report

A former Governor of New Jersey, Robert B. Meyner, testified as a character witness for Sternkopf. He testified as to Sternkopf's reputation for honesty, integrity and veracity. On cross examination he insisted he had never heard anything bad about Sternkopf and he volunteered that he had him checked out quite thoroughly before appointing him, on the recommendation of J. V. Kenny to the New Jersey Turnpike Authority. Mr. Meyner was then confronted with sections of a report on an

investigation into the municipal affairs of Jersey City made in 1954 and commonly known as the Larner Report. Prepared at the order of the Superior Court of New Jersey, it reflected quite adversely upon Sternkopf's performance as the supposedly independent City Auditor. Sternkopf contends this kind of cross examination of a character witness was impermissible. We have held otherwise. *United States* v. *Polack*, 442 F.2d 446, 477 (3d Cir. 1971), *cert. denied*, 403 U.S. 931 (1971). The scope of cross examination was within the sound discretion of the trial court. That discretion was not abused here. The cross examination went to Mr. Meyner's knowledge of Sternkopf's reputation and to Mr. Meyner's standard of good repute.

C. Krope's Financial Condition

On his direct examination Kropke admitted delivering the attache case full of cash from J. V. Kenny to Brill. *See* p. 20 *supra*. He admitted that he attempted, after the grand jury investigation was underway, to return to Schuster of Ashland Oil $9,000 of a $10,000 payment which had been obtained from Ashland, acting at the direction of Wolfe. In these transactions, he contended, he was an innocent and unknowledgeable participant. He ended his direct testimony by asserting that he never took a dollar from any of the contractors doing business with Hudson County. He complains on appeal that he was cross examined about his financial worth and his expenditures and that in such cross examination the Government made use of his income tax returns. The returns were used only to refresh his recollection as to his reported income, and no claim was made that they were false. The cross examination was proper. Kropke, holding a trusted appointive law enforcement position in a governmental apparatus which, the evidence disclosed,

had been largely diverted from the purpose of public service to that of private gain, had participated in the efforts of some of the co-conspirators to secrete the loot, and had participated in the efforts of others, when the grand jury investigation was in progress, to return some of the extorted funds to Ashland Oil Company. In the face of such evidence it was proper for the court to permit the Government to test the credibility of his protestations of non-participation by seeking to establish the sources of his expenditures during the years in question. The bounds of such cross examination was a matter for the discretion of the trial court. *United States* v. *Greenberg*, 419 F.2d 808 (3d Cir. 1971). No abuse of that discretion appears in this record.

### D. The Court's Refusal to Recall a Government Witness

Appellant Murphy contends that it was error for the court to refuse to recall the witness Manning, at the end of the case, nine days after he had completed his testimony, for further cross examination. The alleged purpose of the additional cross examination was to attack Manning's credibility by showing that he had been the indirect recipient of money from Girard Engineering Co., one of the extortion victims. The documents upon which this cross examination was proposed to be based were available to counsel at the time of the original cross examination. In that cross examination the credibility of Manning, the immunized defendant and admitted co-conspirator was attacked literally for days. The scope of cross examination on credibility issues was within the discretion of the trial court. The privilege of recross examination *a fortiori* ". . . lies within the trial court's discretion." *United States* v. *Stoehr*, 196 F.2d 276, 280 (3rd Cir.), *cert. denied*, 344 U.S. 826 (1952).

We have considered each other reference to alleged improper cross examination or limitation on cross examination asserted by any defendant, and in the light of the record we find no abuse of discretion with respect to the permitted scope of examination, and no error.

## V. Sufficiency of the Evidence

The only appellants who contest the sufficiency of the evidence to support the jury verdict are Kunz and Kropke. We have heretofore in other context discussed the evidence connecting Kropke to the conspiracy. *See* p. 26 *supra*. That evidence looked at with a view most favorable to the Government was sufficient to present a jury question and to support the verdict on which Kropke was convicted. *United States* v. *Alper*, 449 F.2d 1223, 1227 (3rd Cir. 1971); *United States* v. *Carlson*, 359 F.2d 592, 597 (3d Cir. 1966). Measured by the same test the evidence connecting Kunz to the conspiracy, though concededly not as strong as that tying in the other defendants was also sufficient. Once the conspiracy is established, as here it was abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States* v. *Addonizio*, 449 F.2d 100, 102 (3d Cir. 1971); *United States* v. *Weber*, 437 F.2d 327, 336 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); *United States* v. *Bey*, 437 F.2d 188, 192 (3d Cir. 1971).

From July 1, 1965 to July 1, 1969 Kunz was Director of the Department of Public Works of Jersey City. All public works contracts were supervised by his department. Di Feo testified that Kunz ordered the cars for the Jersey City Sewerage Authority on which he paid Flaherty a 10% kickback. The evidence established that on every public works contract let by the Public Works Department a kickback was exacted. The witness Dolan testified that

when he became Chief Engineer of that Department Kunz told him that he was not to issue plans and specifications to any contractors without prior clearance from Murphy (Tr. 3246-48). Even though Dolan believed it was his function as Chief Engineer to prequalify contractors, he followed Kunz's instructions. The evidence established that Murphy's pre-qualification consisted of the exaction of an agreement upon a 10% kickback. Kunz asserts that none of the above evidence establishes his knowledge of or participation in the conspiracy. But it is established in the record that neither Kunz nor any other of the defendants would have been in the public positions which they held without the approval of the system's head, J. V. Kenny. In 1969 Kunz was promoted from Director of the Department of Public Works to Business Administrator. After it was public knowledge that the federal grand jury was investigating Jersey City and Hundson County Kunz, the City Business Administrator, called Dolan to his office and this conversation ensued:

> "The Witness [Dolan]: Mr. Kunz asked me to come down to his office, which I did do. We discussed several aspects of City business and then he asked me if I had heard the latest about Mario Gallo.
>
> I said to him, 'No, what is the latest about Mario Gallo?'
>
> He said, 'They found him with a rope around his neck, the same thing could happen to you or to anyone else who talks about what is going on in Jersey City.'" (Tr. 3326).

We cannot say that the foregoing evidence, looked at most favorably to the Government, does not support the jury verdict against Kunz. *See United States* v. *Alper, supra.* at 1227.

*Appendix A*

## VI. The Suppression Motion At Trial

We have discussed heretofore *supra*, p. 7, the contention that a warrant search of the offices of Kropke and Stapleton was not supported by an adequate warrant. At trial the defendant Stapleton moved to suppress the testimony of the witness Schuster and Roetman on the ground that it was the fruit of an illegal search. Fed. R. Crim. P. 41(a)(4); *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court heard argument on the motions and declined to hold an evidentiary hearing.

Schuster, an employee of Standard Bithulitic, a division of Ashland Oil Co., appeared before the federal grand jury on September 23, 1970 pursuant to a subpoena. He had not previously been in touch with any government agent. His testimony on September 23, 1970 was limited to the structure of Standard Bithulitic and Warren Brothers, and to the identity of various corporate officers.

On October 7, 1970 Kropke appeared at Schuster's office, identified someone, falsely, as Wolfe, and attempted to see Schuster for the purpose of returning to Schuster $9,000 out of $10,000 which had been extorted from Schuster's company, and of explaining that the "dinner tickets" which the company purchased were only $100 each, not $1,000 each. He saw Schuster's secretary, Roetman, made known the purpose of the call, but since Schuster wasn't available, did not deliver the money. The money later was seized in Stapleton's office.

Prior to October 8, 1970 Schuster gave the United States Attorney the information about Kropke's approach. (Tr. 2526, 2530, 2537). The affidavit in support of the search warrant for Stapleton's office is dated October 8, 1970. (Appellants' Appendix 265). The warrant issued on October 8, 1970 (Appellants' Appendix

267) and was executed the same day. Thereafter on November 11, 1970 Schuster appeared before the grand jury and testified about the conspiracy.

The trial court declined to hold an evidentiary hearing because rather than Schuster's and Roetman's testimony being the fruit of the search it was clear in the record that the search was the fruit of the information disclosed, prior thereto, by Schuster. (Tr. 2556-63). The exclusionary rule operates on the fruits of the search, not the seeds.

## VII. The Trial Court's Attitude

Appellant Murphy, in particular, and all of the appellants to some degree, assert that the trial judge throughout the trial manifested by his attitude toward defense counsel such extreme hostility and prejudice as to deprive them of a fair trial. From our trial judges we require basic fairness. We desire equanimity. We cannot expect perfect sanctity. No record of over seven thousand pages of a hard fought trial has ever been created in which, removed from the overall context, an appellate court could not isolate occasional indications of impatience or even irritability. This entire record is remarkably free from such indications, and to the extent they do exist they show an even handed effort on the part of the trial court to keep both the government attorneys and the defense attorneys within appropriate bounds. This was a long and hard fought trial before a sequestered jury. The court's efforts to prevent its undue prolongation were proper. *See, e.g., United States* v. *Murray*, 445 F.2d 1171, 1176 (3d Cir. 1971) and cases cited. The incidents of which the appellants, especially Murphy, complain, were directed principally to that end. The entire record discloses that the appellants, including Murphy, received a basically fair trial.

*Appendix A*

VIII. The Government's Comments During Summation

The appellants complain that a part of the Government's summation was improper. The part complained of reads:

> "The first count of this indictment charges that from at least as early as November 1963 the defendants now on trial before you and the other defendants who were severed and other people who are unknown to the Grand Jury entered into a combination, kind of system, under which contractors, engineers, suppliers, anybody who wanted to do business in Jersey City or Hudson county was required to pay tribute, to kickback. You have seen during the course of this trial a number of contractors take the witness stand and testify to exactly that. You have seen two men who were part and parcel with these other men at one time, and they were not talking about them the way they talked about them in the past few days several years ago when they were occupying the adjoining offices. You have seen them take the stand and tell you what was going on, not in Runnymede but in Jersey City and Hudson County, and I suppose the most shocking thing of all about this trial is that in seven full weeks *you have not heard a single contractor take the stand, not a single engineer, not a single supplier take the stand and say, 'I did business in Jersey City, in Hudson County and I didn't have to kick-back.'*" (Tr. 6637) (emphasis added)

The Government witnesses testified that under the system of which they and the defendants were part *every* contractor doing business with the city had to kick back 10% of the contract price. Numerous contractors and suppliers corroborated this testimony by proof of kick backs they made. The defendants were in a position to know of other contractors who did business with the city, and these contractors were certainly within reach of the court's

process. None were called. The comment on their absence was appropriate:

> ". . . The rule even in criminal cases, is that, if a party has it particularly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves* v. *United States*, 150 U.S. 118, 121 (1893).

*See also United States* v. *Restaino*, 369 F.2d 544, 547 (3d Cir. 1966); *United States* v. *Lowe*, 234 F.2d 919 (3d Cir. 1956), *cert. denied*, 352 U.S. 838 (1956).

## IX. The Court's Charge

One or more of the appellants urge that the court's charge was deficient in one respect or another. Most of these contentions were not called to the attention of the trial court after the charge and before the jury retired to deliberate and hence may not be assigned as error here. Fed. R. Crim. P. 30. Other matters were called to the trial court's attention and were in fact corrected. *See, e.g.*, p. 27 *supra* dealing with Di Feo's testimony.

Kropke did take exception to the trial court's definition of extortion under 18 U.S.C. § 1951. The instruction given reads:

> "The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. The term 'fear', as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.
>
> • • • •
>
> Extortion under color of official right is the wrongful taking by a public officer of money not due him or his

> office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed." (Tr. 6773-74).

Kropke's objection is that the quoted instruction defines Hobbs Act extortion disjunctively; that is, obtaining money or property either by use of fear or under color of official right.

In *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir. 1971), which also involved extortion by public officials, the case was submitted to the jury only on a use of fear theory. It has been held that the "under color of official right" language may have no applicability to extortionate acts committed by private individuals. *Bianchi* v. *United States*, 219 F.2d 182, 192 (8th Cir. 1955), *cert. denied*, 349 U.S. 915 (1955). But while private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in § 1951(2):

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. *See, e.g., United States* v. *Nardello*, 393 U.S. 286, 289 (1969); *United States* v. *Sutter*, 160 F.2d 754, 756 (7th Cir. 1947); *State* v.

*Begyn*, 34 N.J. 35, 167 A.2d 161 (1961); *State* v. *Weleck*, 10 N.J. 355, 371 (91 A.2d 751, 759-60 (1952). The disjunctive charge on § 1951 extortion was correct.

Appellant Kunz complains that the court did not in its charge sufficiently marshal the evidence applicable to him. He did not request that this be done, undoubtedly because his attorney did so skillfully, presenting the evidence against him in its favorable light.

X. Sternkopf's Sentence

Sternkopf contends that the $20,000 fine imposed on him was improper because the sentence was a general one and the maximum on any single court was $10,000.00. He cites no authority for this proposition. The maximum fine in a general sentence may be determined by aggregating the maximum under each valid count. *See e.g.*, *Peoples* v. *United States*, 412 F.2d 5, 6 (8th Cir. 1969); *United States* v. *Woykovsky*, 297 F.2d 179, 181 (7th Cir. 1961), *cert. denied*, 369 U.S. 872 (1962); *Robles* v. *United States*, 279 F.2d 401, 407 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961). In *United States* v. *Rose*, 215 F.2d 617, 630 (3d Cir. 1954) we said "We are strongly of the opinion that it is highly desirable that the trial judge in imposing sentence on an indictment containing more than one count deal separately with each count." The affirmance should not be construed as any change in our view as to the desirability of separate treatment.

The judgments appealed from will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

## APPENDIX B

### Title 18 U.S.C. Section 371, The General Conspiracy Statute

*Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

### Title 18 U.S.C. Section 1951, The Hobbs Act

*Interference with commerce by threats or violence*

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence,

or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

## Title 18 U.S.C. Section 1952, The Travel Act

*Interstate and foreign travel or transportation in aid of racketeering enterprises*

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102 (6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

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Amendment V to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, libery, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*Appendix B*

Amendment VI to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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Nos. 72-118, 72-119, 72-120, 72-121 and 72-128

FRED J. KROPKE, JOSEPH B. STAPLETON, PHILIPP W. KUNZ, BERNARD MURPHY AND WILLIAM A. STERNKOPF, JR., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a lengthy jury trial in the United States District Court for the District of New Jersey, petitioners—public officials and political leaders in Jersey City and Hudson County, New Jersey—were convicted on a number of counts of conspiracy and extortion. These included one count charging a conspiracy to affect interstate commerce by extortion from

contractors seeking contracts with the city or county, in violation of 18 U.S.C. 1951 (the Hobbs Act); one count charging a conspiracy to violate 18 U.S.C. 1952 (the Travel Act) by using the facilities of interstate commerce with intent to carry on the crimes of bribery and extortion in violation of the New Jersey law; and various substantive counts charging violations of the Hobbs Act. Sentences ranging from two years' imprisonment (with eighteen months suspended) to fifteen years' imprisonment were imposed; in addition, petitioner Sternkopf was also fined $20,000.

The gist of the conspiracy, which by the time of indictment was alleged to have continued for seven years, was the imposition upon the city and county administrations of a system whereby no one could do business with either without kicking back a percentage (usually 10 per cent) of the contract price. The kickback requirement was enforced in three ways: (1) by a "pre-qualification" arrangement which excluded from the competitive bidding process those contractors unwilling to make kickbacks; (2) by withholding payments for work already done until kickbacks were made; and (3) by not awarding contracts not subject to competitive bidding to anyone unwilling to make kickbacks.

In separate petitions for writs of certiorari, petitioners present the following claims: (1) that the conspiracy counts were unconstitutionally vague (Sternkopf as to the § 1952 count, Kropke as to both); (2) that there was a fatal variance between the extortions charged and those proved (Sternkopf and

Kunz); (3) that a single conspiracy was charged but multiple conspiracies were proved (Sternkopf, Kunz and Murphy); (4) that a severance was improperly denied (Kunz); (5) that the evidence was insufficient (Kunz); (6) that the indictment was invalid because it was based upon unlawfully obtained evidence and a harassing interrogation of a defendant who was denied permission to obtain counsel (Stapleton); (7) that suppressed evidence was improperly used to impeach defendants who testified in their own defense (Kropke and Stapleton); (8) that a hearing on a claim of unlawful search and seizure was improperly denied (Stapleton); (9) that the trial court improperly charged the elements of extortion under the Hobbs Act (Kropke); and (10) that money intended to be used for defense preparation was improperly admitted as government evidence (Murphy).

All of these contentions were fully considered and rejected by the court of appeals in its 44-page opinion. That opinion adequately expressly, and we believe properly accepts, our contentions with respect to these issues.

Petitioner Kropke makes one further contention not answered in the opinion of the court below. He contends that the indictment should have been dismissed as to him because he was called to testify before the grand jury and not warned that he was a target of the investigation. He was, however, explicitly advised both prior to his appearance and before the grand jury itself that he had the right to

refuse to testify and a right to consult with counsel. This was all that was required. The conflicting proposition enunciated in *Jones* v. *United States*, 342 F.2d 863, 867-870 (C.A. D.C.), upon which he chiefly relies, constituted the dissenting view and not the holding of that case. See 342 F.2d at 880.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

SEPTEMBER 1972.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-128

WILLIAM A. STERNKOPF, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY BRIEF FOR PETITIONER

W. A. SUTHERLAND
MAC ASBILL, JR.
JEROME B. LIBIN
RUFUS E. BROWN
MICHAEL L. DENGER
1200 Farragut Building
Washington, D. C. 20006
*Attorneys for Petitioner*

SAIBER, SCHLESINGER AND SATZ
11 Commerce Street
Newark, New Jersey 07102

SUTHERLAND, ASBILL & BRENNAN
1200 Farragut Building
Washington, D. C. 20006
*Of Counsel*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-128

WILLIAM A. STERNKOPF, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

---

**On Petitioner for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## REPLY BRIEF FOR PETITIONER

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The government, in one paragraph of its Memorandum in Opposition (p. 2), has done what the Court of Appeals deliberately refrained from doing in its 44 page opinion—namely, describe clearly and unambiguously the conspiracy with which petitioner was charged by the Grand Jury. As the government states, "the conspiracy" with which petitioner was charged was one to extort from *contractors* seeking to do *business with Hudson County or Jersey City.*

When this simple statement of the conspiracy charged is compared with the evidence introduced against Sternkopf, it becomes clear beyond doubt that under the unconstitutionally vague Count II the prosecutor was allowed to prove, and the jury was permitted to convict on the basis of, transactions clearly beyond the scope of "the conspiracy" charged. These transactions, which were never considered by the Grand Jury, had nothing to do with contracts with the city or county; they involved alleged bribery in connection with (a) contracts with the New York Port Authority and the New Jersey Turnpike Authority (both totally unrelated to Jersey City or Hudson County), and (b) certain gambling operations which involved no contracts of any sort.

To charge one conspiracy and to prove, under the umbrella of an unconstitutionally vague count, totally different conspiracies is to disregard all rules of fair procedure and to deprive a defendant of his right to a fair trial. Simple justice, as well as the integrity of our system of criminal procedure, demands corrective action by this Court.

Respectfully submitted,

W. A. SUTHERLAND
MAC ASBILL, JR.
JEROME B. LIBIN
RUFUS E. BROWN

MICHAEL L. DENGER
1200 Farragut Building
Washington, D. C. 20006
*Attorneys for Petitioner*

SEPTEMBER 8, 1972